South Carolina Law Review

Volume 26 | Issue 2 Article 6

Summer 6-1-1974

Domestic Relationships

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DOMESTIC RELATIONS

I. CHILD CUSTODY AND VISITATION RIGHTS

By 1905 the South Carolina Supreme Court had recognized the common law rule that the child's welfare is the paramount consideration in determining custody of a child.[1] At an earlier time under the common law, the natural father had the primary right to the child's custody.[2] Because the law imposed upon the father the responsibility of education and support, courts had reasoned that his claim was superior to that of the mother.[3] Statutes have eliminated all preferences between parents,[4] and the welfare of the child remains the controlling factor in custody proceedings.[5] During the past term, the supreme court heard custody disputes arising in various contexts—between parents, between a parent and grandparents, and between a parent and a third party.

A. *Disputes Between Parents*

In *Peay v. Peay*,[6] the court awarded the custody of a five year old child to his father. The record clearly showed that both of the parties contributed to the marital disruption,[7] but neither was

1. *Ex parte* Davidge, 72 S.C. 16, 18, 51 S.E. 269, 270 (1905).

2. *Ex parte* Rembert, 82 S.C. 336, 340, 64 S.E. 150, 151 (1909); *but see Ex parte Tillman*, 84 S.C. 552, 561, 66 S.E. 1049, 1054 (1910), where the court states: "[W]hen the father relinquishes his right to the custody or forfeits it by his conduct, there can be no doubt that the mother . . . is entitled to the care and custody of her children."

3. *Ex parte* Davidge, 72 S.C. 16, 18, 51 S.E. 269, 269 (1905).

4. S.C. CODE ANN. § 31-51 (1962) provides:

> The wife and husband are the joint natural guardians of their minor children and are equally charged with their welfare and education and the care and management of their estates and the wife and husband shall have equal power, right and duties and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor or any other matter affecting the minor. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody. The welfare of the minor shall be the first consideration and the court having jurisdiction shall determine all questions concerning the guardianship of the minor. Nothing herein contained shall be construed to relieve the father of his common-law obligation to support his children, nor shall it be construed to increase the liability of the mother to support the children.

5. *See* Powell v. Powell, 256 S.C. 111, 181 S.E.2d 13 (1971); Ford v. Ford, 242 S.C. 344, 130 S.E.2d 916 (1963); Koon v. Koon, 203 S.C. 556, 28 S.E.2d 89 (1944).

6. 260 S.C. 108, 194 S.E.2d 392 (1973).

7. Record at 6 and 44.

adjudged an unfit parent.[8] The lower court emphasized the finding that the wife had had an affair two years prior to the couple's separation. Although the wife denied that the affair caused the separation,[9] the court accepted the husband's contention that she left him because of "her desire for someone else."[10] The evidence indicating the nature of the subsequent relationships was conflicting. The husband complained of another man's presence in the apartment of his wife, but the wife denied any improper conduct. Apparently relying upon the husband's testimony, the trial court ruled that "it would be advisable for the [wife] not to have the child with someone else in the apartment."[11]

After reviewing the entire record, the supreme court affirmed the lower court's decision, finding no error in the "conclusion that the evidence preponderates in favor of the father."[12] Deference to the trial court in custody proceedings was justified by the court on the ground that it is the trial judge who actually sees and hears the witnesses and must retain jurisdiction over the case should subsequent conflicts arise.[13] However, as noted in Justice Bussey's dissent, such deference in *Peay* was disturbing because the order of the trial judge "failed[ed] to show upon which asserted facts the ultimate conclusion of the court [was] based."[14] The trial court's order did not address the potential physical surroundings of the child, the tender years doctrine, or the relative suitability of the parents.[15] However, the majority, although recognizing that "the order . . . might have been more full,"[16] found that it met the minimal compliance.[17]

The supreme court also heard cases in which the petitioners sought a change of custody. In South Carolina, it is well established that a judicial award of the custody of a child is never final.[18] Custody orders included in divorce decrees are usually

8. 260 S.C. at 113, 194 S.E.2d at 394 (Bussey, J., dissenting).
9. Record at 69.
10. Record at 78-79.
11. Record at 78.
12. 260 S.C. at 111, 194 S.E.2d at 393.
13. *Id.*
14. *Id.* at 113, 194 S.E.2d at 394.
15. Brief for Appellant at 12.
16. 260 S.C. at 112, 194 S.E.2d at 394.
17. *Id.* FAM. CT. R. 13 states: "The orders and decrees of the court shall set forth the salient facts upon which the order is granted."
18. Moore v. Moore, 235 S.C. 386, 111 S.E.2d 695 (1959); Douglass v. Merriman, 163 S.C. 210, 161 S.E.2d 452 (1931).

modifiable by the court issuing the original decree as well as by other courts of competent jurisdiction.[19] To obtain a change of custody in South Carolina, the party seeking the modification must show the existence of new facts and circumstances which substantially affect the interest and welfare of the child.[20]

In *Barrett v. Barrett*,[21] the court considered the degree of change in condition sufficient to warrant a change in custody. In accordance with his visitation rights, the father of three minor children travelled to Ohio and brought them back to Greenville with him for the summer. Upon his return, he instituted a proceeding for a change of custody, alleging that the remarriage of the mother constituted a sufficient change of circumstances. The court found no evidence in the record to show that the remarriage would be detrimental to the children's best interests and thus reversed the trial court's modification of custody. The court noted that remarriage generally is not a change of condition which is adverse in character; rather it has often provided a basis for obtaining custody.[22]

Similarly, in *Smith v. Smith*,[23] the father instituted a proceeding alleging that the wife's remarriage constituted a change

19. H. CLARK, THE LAW OF DOMESTIC RELATIONS § 17.7 (1968) [hereinafter cited as H. CLARK].

20. Pullen v. Pullen, 253 S.C. 123, 128, 169 S.E.2d 376, 378 (1969). South Carolina seemingly follows the more restricted view in allowing modification only upon proof of a change in circumstances occurring subsequent to the original decree. H. CLARK, *supra* note 19; *see also* Mixson v. Mixson, 253 S.C. 436, 171 S.E.2d 581 (1969); *Ex parte* Atkinson, 238 S.C. 521, 121 S.E.2d 4 (1961); Annot., 9 A.L.R. 623 (1950). It has been suggested that jurisdictions which follow the more restricted view recognize the societal interest in promoting the finality of judgments. On the other hand, a large number of jurisdictions have adopted the view that the interests of the child override the principles of res judicata. In these jurisdictions, not only changes in conditions following the first decree but also facts existing at thetime of the earlier decree which were not presented to the court issuing the decree may be used as grounds for modifying custody arrangements. H. CLARK, *supra* note 19.

21. 261 S.C. 111, 198 S.E.2d 532 (1973).

22. *Id.* at 115, 198 S.E.2d at 534, *quoting* Moorhead v. Scott, 259 S.C. 580, 585, 193 S.E.2d 510, 513 (1972). Although the *Barrett* decision may be explained on the basis of the court's strict adherence to the requirements which constitute a change in circumstances, the opinion is susceptible to further interpretation. It is certainly possible that the supreme court is demonstrating that it does not plan to become a forum favorable to parents who, after obtaining temporary custody of their children, return to the state and somewhat surreptitiously institute a proceeding for a change in custody. Although the father had legitimately obtained temporary custody of the children, they were to be returned to the mother at the close of the summer vacation. It was only upon the mother's arrival in South Carolina at the end of the summer that she learned of the new custody proceeding. *Id.* at 144, 198 S.E.2d at 533.

23. 261 S.C. 81, 198 S.E.2d 271 (1973).

of circumstances sufficient to justify a modification of custody. The supreme court, in reversing the lower court's decision to modify the custody, noted that no finding had been made that the child would not receive reasonable and proper care if custody remained with the mother and her new husband. The trial court was influenced by the fact that the mother removed the child from the state without the knowledge or permission of the court or the father. The supreme court pointed out, however, that the original decree granting custody to the mother placed no restrictions upon where she and the child were to live. The mother's leaving the state to live with relatives was not considered a material change in condition which warranted change in custody. Furthermore, even assuming that this action did violate the custodial decree by depriving the father of visitation rights, it would not necessarily require a change in custody. An award or change of custody, the court cautioned, may not be used to punish a parent for acting in violation of an order of the court.[24]

The lower court also emphasized the express desire of the child to reside with the father. Recognizing that the wishes of the child are a valid consideration, the *Smith* court pointed out that the significance of a child's preferences depends upon the age of the child and the circumstances involved.[25] The common sense rule concerning the significance to be attached to the preference of the child was developed in great detail in an early supreme court decision.[26] A child's desires are considered not because he has a legal right to be placed in the custody of the parent of his choice but instead to enable the court to exercise its discretion more wisely. In a recent decision, the court noted that "the wishes of a child of any age may be considered . . . , but that the weight given to those wishes must be dominated by what is best for the welfare of the [child]."[27] The court, in most instances, is willing to follow the preference of a child in his teens but places little reliance on the desires of younger children.[28] In *Smith*, the court did not find the wishes of the seven year old child extremely persuasive because the record strongly indicated that his

24. *Id.* at 83-84, 198 S.E.2d at 273-74.

25. *Id.* at 85, 198 S.E.2d at 274.

26. *Ex parte* Reynolds, 73 S.C. 580, 53 S.E. 490 (1906).

27. Moorhead v. Scott, 259 S.C. 580, 585, 193 S.E.2d 510, 513 (1972).

28. Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 172 (1970); Poliakoff v. Poliakoff, 221 S.C. 391, 70 S.E.2d 625 (1952); Workman v. Watts, 74 S.C. 546, 54 S.E. 775 (1906); *Ex parte* Reynolds, 73 S.C. 296, 53 S.E. 490 (1906).

preference was influenced by the permissive attitude of his father.[29]

B. *Disputes Between Parents and Grandparents*

In *Welchel v. Boyter*,[30] the issue before the court was whether the stepfather could be held in contempt of a prior order of the court. In response to continuous harassment by the grandparents, the child's parents had commenced an action in the county court seeking an injunction. Finding that the grandparents had unreasonably harrassed the parents, the trial judge granted the relief sought, but stipulated that the child be permitted to speak with the grandparents on the telephone at specified times.[31] The grandparents subsequently brought a proceeding for contempt, alleging that the stepfather "had been uncooperative in carrying out the order of the court"[32] and had further discouraged the child from communicating with the grandparents. The trial judge found the stepfather in contempt of court and sentenced him to confinement for fifteen days, unless he "purge[d] himself" by permitting the child to have lunch with the grandparents on two successive Saturdays.[33] Without reviewing the evidence, the supreme court reversed the lower court's decision, pointing out that the trial judge's findings failed to establish the stepfather's disobedience of the court order. Emphasizing that the prior order had

29. The court relied upon the report of the probation officer of the Family Court which recommended that the father receive custody, but also stated:

> Robbie expressed a desire to stay with his father, but to be allowed visitation with his mother. He pointed out few negatives as far as living with his mother and his motives for wanting to stay with his father are questionable as pointed out by Linda Smith (the father's second wife). She feels Robbie is given more in all ways from his father now because of the tension of not knowing if Robbie will get to stay with him. Robbie knows this and is able to manipulate both his father and his mother with the circumstances.

261 S.C. at 86, 198 S.E.2d at 274.

30. 260 S.C. 418, 196 S.E.2d 496 (1973).

31. The injunction ordered that:

> [T]he defendants shall be permitted to call Geddes Charles Boyter, III by telephone at 2:00 p.m. on each Sunday, and they shall be permitted to talk to Geddes Charles Boyter, III for a period of time not to exceed thirty (30) minutes. It is further ordered that the defendants are enjoined and restrained from telephoning the Plaintiffs or Geddes Charles Boyter, III at any time other than that time herein prescribed and that the defendants shall not otherwise interfere with, molest, or bother the Plaintiffs or Geddes Charles Boyter, III.

Record at 12.

32. 260 S.C. at 421, 196 S.E.2d at 498.

33. Record, Appendix at 3-4.

commanded nothing of the stepfather, the court stated: "One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do. The language of the commands must be clear and certain rather than implied."[34]

Although the supreme court did not discuss whether the grandparents had a right to visit their grandson, this issue warrants further comment. *Welchel* is illustrative of the situation which often arises when the parents of a deceased father or mother wish to establish visitation rights with their grandchild. In this case, the child's father was deceased, and after the remarriage of the mother, considerable discord developed between the paternal grandparents and the child's mother and stepfather. In 1971, the grandparents had instituted a proceeding to establish rights of visitation with their grandson. The Family Court of Spartanburg denied their petition, holding that "the grandparents had no right of visitation against the wishes of the mother having custody of the child."[35] As in custody proceedings, the primary consideration in determining visitation rights is the welfare of the child.[36] It must be noted that even between a natural father and mother who have equal rights, duties and powers concerning the custody of their child, neither is provided a legal right to visitation.[37] The privilege of visitation must "yield to the good of the child and may be denied or limited where the best interests of the child will be served thereby."[38] Applying this rule to the situation at hand, it similarly follows that, while the court may grant the privilege if it is in the child's best interest, grandparents have no absolute right to visitation.[39]

34. 260 S.C. at 421, 196 S.E.2d at 498.

35. *Id.* at 420, 196 S.E.2d at 497.

36. Grimsley v. Grimsley, 250 S.C. 389, 393, 158 S.E.2d 197, 199 (1967). The determination of visitation rights is generally one addressed to the trial court's broad discretion and, absent a finding of clear abuse of such discretion, will not be denied, granted, or modified. *See* Porter v. Porter, 246 S.C. 332, 340, 143 S.E.2d 619, 623 (1963).

Numerous jurisdictions have adopted the view that when a parent is awarded custody of the child, a grandparent cannot obtain an order allowing him to take the child to his own home or elsewhere for even limited periods of time. However, the court may order the parent to allow the grandparent to visit the child in the home of the custodian at specified times. On the other hand, other courts have held that grandparents may be given visitation rights if a sufficient showing is made that the welfare of the child requires or will not be adversely affected by it. 24 AM. JUR. 2d *Divorce and Separation* § 864 (1966).

37. *See* Porter v. Porter, 246 S.C. 332, 340, 143 S.E.2d 619, 624 (1963).

38. *Id.*

39. In Douglass v. Merriman, 163 S.C. 210, 161 S.E. 452 (1931), the father instituted

C. *Disputes Between Parents and Third Persons*

Suits involving third persons often arise when a parent leaves a child with a friend or relative who later refuses to return the child when requested to do so.[40] Generally such disputes are resolved by applying the traditional principle requiring custody to be awarded with regard to the best interests of the child. However, in *McCormick v. McMurray*,[41] the supreme court was faced with the limited statutory question of whether the child had been voluntarily abandoned; an affirmative decision would have barred the parental rights of the mother forever.[42]

The Family Court Judge determined that the child had not been voluntarily abandoned and ordered immediate custody to the mother. The record revealed that the mother had been in a difficult financial situation at the time she left the child with the foster parents and that the adverse circumstances had continued until the time of the proceeding. Although the foster parents conceded that they knew of the mother's destitute situation, they contended "that her conduct during the subsequent twelve month period evidenced a settled purpose to relinquish all paren-

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a proceeding to obtain custody of his four year old child, who had since birth lived with his maternal grandparents. Although granting custody of the child to the widowed father who had recently remarried, the supreme court expressly provided visitation rights to the grandparents who had supported and cared for the child.

Although the grandparents in Welchel v. Boyter, 260 S.C. 418, 196 S.E.2d 496 (1973), had never continuously cared for the child, the mother conceded that she had lived with them while her husband was in the service and was living with them at the time the child was born. Furthermore, the record revealed that the mother and child had continued to live with the grandparents until the child was a year old and, thereafter, had visited in their home several times a week until the child was three years old. Record at 15.

40. H. CLARK, *supra* note 19, § 17.5.

41. 260 S.C. 452, 196 S.E.2d 642 (1973).

42. The petitioners, who had been given custody of the five year old child by the mother, instituted this action under S.C. CODE ANN. §§ 31-51.1 *et seq.* (1962), seeking an order terminating the mother's parental rights and granting exclusive custody to them. Section 31-51.4 provides:

> If the court, after this hearing, finds that the child has been voluntarily abandoned for a period in excess of twelve months, it may issue an order forever barring parental or guardianship rights as to such minor child and may award custody of the child as it deems proper, and such child shall be eligible for adoption.

Sections 31-51.1 to .5 have been repealed and replaced by §§ 31-60 to 65 which became effective July 14, 1972. The present statute shortens the period necessary to constitute "abandonment" to six months. It further explicitly defines the circumstances under which a court is to find that a child has been "abandoned." S.C. CODE ANN. §§ 31-60 to 65 (Cum. Supp. 1973).

tal claims to the child."[43] Since giving custody to the petitioners, the mother had only visited the child twice and had written letters to the foster parents indicating a willingness to permit their adoption of the child.[44] The supreme court found, however, that the record amply supported the trial judge's findings that the mother's actions were prompted by the same financial difficulties which had originally motivated the mother to leave the child. The court, quoting from an earlier decision, emphasized that a finding of voluntary abandonment must include evidence of conduct "on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. It does not include an act or course of conduct which is done through force of circumstances or from dire necessity."[45] The court affirmed the lower court's decision on the issue of voluntary abandonment, finding that the mother never intended to abandon her child and that she originally left the child with petitioners because of her financial difficulties. The order granting immediate custody of the child to the mother was, however, reversed. The court found that the trial judge had, in part, based his decision on the clearly erroneous conclusion of law that as between the two parties the natural mother was automatically entitled to immediate custody. Again referring to the elementary rule that the best interests of the child is the controlling factor, the court remanded for further hearings on this issue.

II. ALIMONY AND CHILD SUPPORT

A. *Alimony*

Although the authority to grant alimony is provided in nearly every state by statute,[46] "a wife is never entitled to alimony as a matter of course."[47] The allowance of alimony is a matter within the discretion which the trial judge exercises with reference to all the circumstances of each particular case.[48] The South Carolina Divorce Act authorizes the court in every judgment of divorce to provide maintenance support and alimony as may be fit, equita-

43. 260 S.C. at 455, 196 S.E.2d at 644.

44. Brief for Appellant at 45.

45. 260 S.C. at 455, 196 S.E.2d at 643, *quoting* Bevis v. Bevis, 254 S.C. 345, 351, 175 S.E.2d 398, 400 (1970) (citations omitted).

46. H. CLARK, *supra* note 19, § 14.1. *See also* S.C. CODE ANN. §§ 20-112 to 113 (1962).

47. Murdock v. Murdock, 243 S.C. 218, 224, 133 S.E.2d 323, 326 (1963), *quoting* 17 AM. JUR. *Divorce and Separation* § 672 (1957).

48. Long v. Long, 247 S.C. 250, 252, 146 S.E.2d 873, 875 (1965).

ble and just according to the circumstances of the parties and the nature of the case.[49]

In *Spence v. Spence*,[50] the wife appealed the lower court's order denying an award of alimony. Stipulating that the wife was at liberty to petition the court if a change of conditions occurred, the Family Court Judge found that the wife had sufficient wealth and income and that the husband, who had custody of the children, was presently unable to afford alimony. Construing the order as entitling the wife to alimony, the supreme court reviewed only the question of whether the financial circumstances of the parties should relieve the husband of immediate alimony payments. Upon examining the record, the supreme court reversed the lower court's decision, stating that the trial judge had "failed to properly determine the equities of the case."[51] The evidence clearly supported a finding that the wife had been accustomed to a higher standard of living during the marriage than she could maintain subsequent to the divorce.[52] Further, the court was of the opinion that the trial judge had improperly considered the terms of the property settlement in his denial of alimony. Prior to their separation, the husband and wife owned as tenants in common a home valued at $160,000. Instead of selling the home in partition, the wife agreed to receive $50,000 for her interest and thus enable the husband to retain the home for himself and the children. In determining the question of alimony, the lower court placed great weight on the fact that in partitioning the jointly owned property, the husband was required to finance the payment to the wife and thereby incur additional expenses. The supreme court stated that this factor should not weigh against the wife on the question of alimony because the husband had volun-

49. S.C. CODE ANN. § 20-113 (1962).

Circumstances which a trial judge should consider are the needs of the wife and the child in relation to the husband's ability to provide for those needs. Further, the wife's health, age, general condition, income and earning capacities are important factors. It is also pertinent to consider the necessities and living expenses of the husband. In weighing each of these considerations, the court's allowance of alimony should not be excessive but should be fair and just to all parties concerned. Graham v. Graham, 253 S.C. 486, 171 S.E.2d 704 (1970). *See* Porter v. Porter, 246 S.C. 332, 143 S.E.2d 619 (1965); Murdock v. Murdock, 243 S.C. 218, 133 S.E.2d 323 (1963).

50. 260 S.C. 526, 197 S.E.2d 683 (1973).

51. *Id.* at 530, 197 S.E.2d at 685.

52. The supreme court found that the wife occupied a rented apartment and earned $8,000 per year as a teacher. Further, the court stated that she "has the advantage of income she may earn with the cash she received out of the sale of her interest in the jointly owned property." *Id.*

tarily chosen to buy the wife's half and assume the additional debt. Holding that the trial judge had abused his discretion, the court remanded for a determination of the proper amount of alimony.

Although the trial court in *Herbert v. Herbert*[53] granted the husband a divorce *a vinculo matrimonii* due to his wife's habitual drunkenness, the court found that the wife's conduct did not bar her claim to alimony. To the contrary, the court considered her alcoholic addiction as a factor to be weighed in determining the amount of alimony. The husband based his argument primarily on the well-established rule that the wife is precluded from maintaining a proceeding for separate maintenance "if she is chargeable with substantial fault or misconduct, either by way of act or omission, which materially contributed to the disruption of the marital relation . . . ."[54] The trial judge found that the wife's conduct had been a contributing factor to the couple's marital difficulties, but that it "should not be used as a basis for determining real moral wrongdoing or fault."[55] Agreeing with the lower court's conclusion, the supreme court determined that chronic alcoholism is not to be equated with misconduct, but is better understood as a disease.[56] The court, affirming the allowance of alimony, emphasized that only the adulterous wife is absolutely barred from alimony and that, in all other cases the matter is within the discretion of the trial judge.[57]

In *Smith v. Smith*,[58] the elderly plaintiff appealed from the lower court's decision refusing to grant him a divorce on the grounds of desertion and ordering him to begin monthly payments toward his wife's support.[59] The supreme court labelled the

53. 260 S.C. 86, 194 S.E.2d 238 (1973).

54. Miller v. Miller, 225 S.C. 274, 280, 82 S.E.2d 119, 122 (1934), *quoting* 3 NELSON, DIVORCE AND ANNULMENT § 32.31 (2d ed. 1945).

55. 260 S.C. at 89, 194 S.E.2d at 238.

56. 260 S.C. at 91, 194 S.E.2d at 240, *citing* DeSipio v. DeSipio, 186 A.2d 624 (D.C. Mun. App. 1962).

57. S.C. CODE ANN. § 20-113 (1962) provides:

> In every judgment of divorce from the bonds of matrimony in a suit by the wife the court shall make such orders touching the maintenance, alimony and suit money of the wife or any allowance to be made to her and, if any, the security, to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just. But no alimony shall be granted to an adulterous wife.

See also Kendall v. Kendall, 260 S.C. 570, 197 S.E.2d 689 (1973) (desertion); Page v. Page, 260 S.C. 298, 195 S.E.2d 613 (1973) (desertion).

58. 260 S.C. 65, 194 S.E.2d 199 (1973).

59. *Id.* at 66, 194 S.E.2d at 201.

trial court's order "woefully inadequate" for failing to make express findings as to whether the wife was justified in leaving her husband,[60] but it nevertheless, affirmed the trial judge's determination on that issue.[61] During the trial the wife charged her husband with abusive treatment and with making continuous threats against her life. The court stated that if the wife's testimony was credible, her leaving the marital abode was justified and thus did not constitute desertion.[62]

In his second exception, the husband contended that the lower court erred in compelling support and maintenance payments when a divorce had not been granted to either party. It is well established, however, that the causes for which separate maintenance and support may be granted are not restricted to those which constitute grounds for divorce.[63] A court is authorized to decree maintenance support although a divorce is denied.[64] The court found that the husband received a pension from the Veterans Administration and additional income from two rental houses.[65] Although his health was not perfect, the record indicated that he was in better physical condition than his younger wife. Thus upon reviewing the relative circumstances of the parties and concluding that the wife was justified in living apart from her husband, the court affirmed the order awarding the payment of alimony.[66]

B. *Child Support*

The duty of parents to support and maintain their children exists by statute or common law in every American jurisdiction.[67] The statutes of the various states authorize the courts to enter orders for child support during the pendency of divorce actions,

60. *Id.*

61. *Id.* at 67, 194 S.E.2d at 201.

62. *Id.* The elements of a finding of desertion are set forth in Machado v. Machado, 220 S.C. 90, 100, 66 S.E.2d 629, 633 (1951), *quoting* 1 NELSON, DIVORCE AND ANNULMENT § 4.02 (2d ed. 1945), which lists the essential elements as:

> (1) cessation from cohabitation, (2) intent on the part of the absenting party not to resume it, (3) absence of the opposite party's consent, and (4) absence of justification.

63. Mincey v. Mincey, 224 S.C. 520, 531, 80 S.E.2d 123, 129 (1954); Machado v. Machado, 220 S.C. 90, 103, 66 S.E.2d 629, 635 (1951).

64. Machado v. Machado, 220 S.C. at 103, 66 S.E.2d at 635.

65. 260 S.C. at 67, 194 S.E.2d at 200.

66. *Id.*

67. H. CLARK, *supra* note 19, § 15.1.

as well as orders which continue after the divorce is final.[68] As in the case of child custody, child support orders are modifiable if a change of condition occurs subsequent to the issuance of the original decree.[69]

Grout v. Alexander[70] concerned whether the father had defaulted in making child support payments as required by the divorce decree.[71] In addition the supreme court considered whether a change in the mental health of the son justified increasing the father's support payments. After reviewing the testimony and exhibits, the Family Court Judge found that the father "had made a conscientous effort to care for the minor child."[72] The record reflected that the father had expended large sums of money for medical and hospital bills.[73] Apparently, because of this fact and the father's modest income, the lower court was willing to ignore his failure to meet the weekly support payments required by the divorce decree. However, the supreme court found that the trial judge's decision was "error plain on the record."[74] The court pointed out that the payment of the additional expenditures did not excuse his failure to make the weekly support payments.[75]

Although the couple's child had been of sound mind at the time of the divorce, he had subsequently become mentally ill.[76] Due to the attendant financial, mental and physical burdens placed upon the mother, she petitioned the court to increase the amount of child support. The trial judge dismissed the request, finding the evidence insufficient to warrant additional payments.

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68. *Id.*
69. *Id.* § 15.2.
70. 260 S.C. 655, 197 S.E.2d 826 (1973).
71. The divorce decree ordered in part:
> 3. That the custody of the minor child sixteen years of age is equally placed with both parents with the child having the reasonable right to determine the amount of time spent with either parent.
> 4. It is further provided that while the child is living with the plaintiff the husband shall pay the sum of Twenty ($20.00) Dollars per week to the plaintiff for the child's maintenance with the question of maintenance remaining open without prejudice for further Order of this Court and in addition thereto, the defendant shall discharge all necessary medical, educational, and dental expenses.

Record at 7.
72. Record at 9.
73. Record at 12-13.
74. 260 S.C. at 658, 197 S.E.2d at 827.
75. *Id.* at 659, 197 S.E.2d at 827.
76. Record at 8-9 (The nature of the subsequent illness is described).

The supreme court determined that the evidence provided a "clear inference . . . that change of conditions of the utmost gravity and significance had occurred."[77] Because of the inadequacy of the trial record, however, the court refused to exercise its equity jurisdiction and merely directed a new trial.[78]

III. REVIEW

In the various proceedings involving domestic relations, the broad discretion of the trial judge is seldom questioned. For the most part, the supreme court has followed the general rule that the trial judge's findings will not be disturbed on appeal unless it appears that they are without evidentiary support or against the clear preponderance of the evidence.[79] Recently, however, the court refused to decide two cases because the trial court's findings were so indefinite and the record so inadequate that there was no proper basis for appellate review.[80] In the past term, the court frequently commented on the inadequacy of the findings of the trial judge. In *Sutcliffe v. Sutcliffe*,[81] a child custody proceeding, the supreme court reversed and remanded the case to the Court of Common Pleas of Orangeburg County. The trial judge concluded that the wife was guilty of misconduct which justified the physical abuse by her husband and disqualified her from obtaining custody of the children.[82] However, on appeal, the supreme court found that there had been no "factual finding . . . as to just what the 'misconduct' on the part of the wife" was.[83] Additionally, the court stated:

> Even if the testimony of the wife and her witnesses be entirely discounted, the testimony of the husband would prove no immoral conduct on the part of the wife, and at the most prove nothing more than an impropriety or indiscretion on [*sic*] part sufficient to give rise to some suspicion unless satisfactorily explained. Such would neither justify the conduct of the husband

77. 260 S.C. at 659, 197 S.E.2d at 828.

78. *Id.*

79. *See* Porter v. Porter, 246 S.C. 332, 339, 143 S.E.2d 619, 623 (1965); Frazier v. Frazier, 228 S.C. 149, 165, 89 S.E.2d 225, 233-4 (1955).

80. Sayler v. Parler, 258 S.C. 514, 189 S.E.2d 294 (1972); Shecut v. Shecut, 257 S.C. 354, 185 S.E.2d 895 (1971). In each of these cases, the supreme court found that the Family Court of Orangeburg County had failed to properly consider the issues involved and remanded for new trial.

81. 260 S.C. 198, 195 S.E.2d 113 (1973).

82. *Id.* at 202-03, 195 S.E.2d at 115.

83. *Id.* at 203, 195 S.E.2d at 115.

nor disqualify her to have the custody of the children.[84]

The supreme court recognized that the trial judge not only made clearly erroneous conclusions of fact but also failed to apply the proper criteria in awarding custody.[85] Therefore, on remand, the court explicitly designated the issues to be heard and the pertinent factors to be considered in the custody proceeding.[86]

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84. *Id.*

85. The court's opinion stated:

> Although the only issue herein is the custody of the children, for the most part the record contains evidence tending to establish fault or lack of fault on the part of the respective parties, with only a minimal amount of evidence bearing on what is truly in the best interests of the children involved. While the lower court concluded that the best interests of the children would be served by awarding custody to the father, the decree did not set forth the salient facts upon which it was based, as is required by Rule 13 of the Family Court Rules.

Id. at 202, 195 S.E.2d at 115.

86. *Id.* at 203, 195 S.E.2d at 115.